

1 HON. RICARDO S. MARTINEZ
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT COURT OF WASHINGTON
AT SEATTLE

9 STATE OF WASHINGTON;

10 Plaintiff,

11 v.

12 LANDMARK TECHNOLOGY A, LLC, and
13 RAYMOND MERCADO, individually,

14 Defendants.

15 NO. 2:21-cv-00728-RSM

16 [PROPOSED] ORDER STRIKING
17 STATE'S WITNESSES ALEX STRAND
18 AND DAVID DAY

19 THIS MATTER, having come before the Court on Defendants' Motion to Strike State's
20 Experts or, in the Alternative, to Grant Extension on Rebuttal Witness Reports, and the Court
21 having reviewed the prior pleadings and filings herein, as well as:

- 22 1. Defendants' Motion to Strike State's Experts or, in the Alternative, to Grant
23 Extension on Rebuttal Witness Reports;
- 24 2. Declaration of Justin P. Walsh in Support of Defendants' Motion to Strike State's
25 Experts or, in the Alternative, to Grant Extension on Rebuttal Witness Reports;
- 26 3. The State's Response, and supporting declarations thereto;
- 27 4. Defendants' Reply, and supporting declarations thereto,

28 the Court considers itself fully advised on the matter before it.

[PROPOSED] ORDER STRIKING STATE'S WITNESSES ALEX
STRAND AND DAVID DAY - 1

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1 On April 24, 2023, this Court set a deadline for disclosure of expert reports of April 17,
 2 2024. The parties did submit a stipulation amending this schedule. However, the Court did not
 3 enter an order granting this stipulation, and the dates in the Amended Case Scheduling order
 4 remained. The State submitted two expert reports on May 31, 2024, which, though the date the
 5 parties attempted to stipulate to, was not the date set by this Court.
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7 It is well settled that “A stipulation by the parties for an extension of time is ineffective if
 8 it is not also embodied in an order of the district court.” WRIGHT & MILLER, FED. PRAC. & PROC.
 9 § 1165: EXTENDING TIME IN GENERAL, & n.37 (4th Ed. & June 2024 Update) (citing *In re Sonoma*
 10 *V*, 703 F.2d 429 (9th Cir. 1983), and collecting cases).

12 A failure to timely submit the report by the date ordered by the Court results in a
 13 self-executing exclusion of the expert. As If a party fails to timely disclose its expert
 14 witnesses in a manner prescribed by the court, the party is not allowed to use that
 15 witness to supply evidence, unless the failure was substantially justified or is
 16 harmless. FED. R. CIV. P. 37(c)(1). Rule 37(c) (1) “gives teeth” to the disclosure
 17 requirements of Rule 26(a)(2)(A). *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,
 18 259 F.3d 1101, 1106 (9th Cir. 2001). Exclusion of improperly disclosed expert
 19 witnesses is “selfexecuting [sic] . . . and automatic to provide a strong inducement
 for disclosure of material . . .” *Id.* at 1106 (citations and internal quotation marks
 omitted). Thus, the burden falls on the party facing the sanction to demonstrate that
 its expert witness should not be excluded under Rule 37(c)(1). *Id.* at 1107; *see also*
Torres v. City of Los Angeles, 548 F.3d 1197, 1213 (9th Cir.2008).

20 *Nehara v. Cal.*, No. 1:10-cv-00491 JLT, 2013 WL 5670867 (E.D. Cal. Oct. 16, 2023). “A
 21 scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded
 22 by counsel without peril. The district court’s decision to honor the terms of its binding scheduling
 23 order does not simply exalt procedural technicalities over the merits of [the parties’] case.
 24 Disregard of the order would undermine the court’s ability to control its docket, disrupt the agreed-
 25 upon course of the litigation, and reward the indolent and the cavalier.” *Johnson v. Mammoth*
 26 *Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir.1992) (internal citation and quotations omitted).
 27

The State was well-aware of this Court's order, and the Court never ordered differently. As such, the reports of the State's experts are untimely. David Day and Alex Strand's reports are stricken and they shall not be permitted to testify at trial.

SO ORDERED this ____ day of July, 2024.

HON. RICARDO S. MARTINEZ

[PROPOSED] ORDER STRIKING STATE'S WITNESSES ALEX STRAND AND DAVID DAY - 3

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1 CERTIFICATE OF SERVICE
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4 The undersigned hereby certifies under penalty of perjury under the laws of the United
5 States of America, that on the date noted below, a true and correct copy of the foregoing was
6 delivered and/or transmitted in the manner(s) noted below:
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8

9 ROBERT W. FERGUSON *Attorneys for Plaintiff* [] Via Messenger
10 Attorney General [X] Via Email
11 AARON J. FICKES, WSBA #51584 [] Via Certified Mail
12 BEN J. BRYSACZ, WSBA #54683 [] Via U.S. Mail
13 HEIDI C. ANDERSON, WSBA #37603 [X] Via ECF
14 Assistant Attorneys General
15 Attorneys for Plaintiff State of Washington
16 800 Fifth Avenue, Suite 2000
17 Seattle, WA 98104

18 DATED this 14th day of June, 2024, at Seattle, Washington.

19 s/Joseph A. Hylkema
20 Joseph A. Hylkema
21 Paralegal to Justin P. Walsh
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DECL. OF JUSTIN P. WALSH IN SUPP. OF LANDMARK TECH. A,
LLC'S MOT. TO STRIKE STATE'S EXPERTS OR, IN THE
ALTERNATIVE, TO GRANT EXTENSION ON REBUTTAL
WITNESS REPORTS - 4

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